

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----X	<b>Docket#</b>
TERRENCE SAMPSON,	: 19-cv-04946 (DG) (RER)
	: :
Plaintiff,	: :
	: :
- versus -	: U.S. Courthouse
	: Brooklyn, New York
INTERNATIONAL UNION OF OPERATING :	
ENGINEERS LOCAL 14-14B,	: :
	: May 26, 2022
Defendant	: :
-----X	

TRANSCRIPT OF CIVIL CAUSE FOR PRE-MOTION CONFERENCE  
BEFORE THE HONORABLE RAMON E. REYES, JR.  
UNITED STATES MAGISTRATE JUDGE

**A P P E A R A N C E S:**  
**(VIA VIDEO/AUDIO)**

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1 THE COURT: Good morning. This is Magistrate  
2 Judge Reyes. We're holding a telephone pre-motion  
3 conference in *Sampson v. International Union of Operating*  
4 *Engineers Local 14-14B*, docket number 19-cv-4946.

5 Counsel for plaintiff, please state your name  
6 for the record.

7 MR. O'NEILL: Good morning, your Honor. It's  
8 Michael O'Neill for the plaintiff.

9 THE COURT: Counsel for the defendant?

10 MR. WILLIAMSON: Good morning, your Honor.  
11 Andrew Williamson with FordHarrison here on behalf of the  
12 defendant.

13 THE COURT: Good morning. So Mr. O'Neill, tell  
14 me about the motion that you want to make.

15 MR. O'NEILL: Yes, your Honor. We want to  
16 supplement the complaint. I submitted a proposed  
17 supplemental complaint. I think that's substantially the  
18 form that we would file it in. It's to simply bring  
19 facts that occurred after the filing of the complaint  
20 that are additional facts supporting the claims that were  
21 alleged in the complaint. We would like to bring them  
22 into the case. It was really precipitated when I asked  
23 defendant to update their database with information. I  
24 think when they produced it, they produced it through the  
25 end of 2019. I asked them to give us updated data and

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1 they said it's not part of the case. So I thought that  
2 it would be more expedient to supplement the complaint  
3 than to have a discovery dispute on the issue. So that's  
4 essentially what it is that plaintiff wants to do.

5 THE COURT: The data that was produced was  
6 through the end of 2019?

7 MR. O'NEILL: Correct.

8 THE COURT: Even though the complaint was filed  
9 the third quarter of 20 --

10 MR. O'NEILL: The third quarter of 2019.

11 THE COURT: Yes.

12 MR. O'NEILL: Yeah.

13 THE COURT: The complaint was filed August 29,  
14 2019 that they produce data through the end of 2019,  
15 correct?

16 MR. O'NEILL: That's my understanding.

17 THE COURT: Right. Mr. Williamson, what is the  
18 problem?

19 MR. WILLIAMSON: Your Honor, our position is  
20 really threefold here. The supplemental pleading would  
21 be futile for a number of reasons. (Indiscernible)  
22 completely changed (indiscernible) here which was  
23 originally the client was referred to lower paying jobs  
24 on lower paying machinery. Now it's that he worked less  
25 hours since 2017. He still doesn't identify who, what,

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1 when, and where or how he was discriminated against, but  
2 he's an African-American. He filed an EEOC charge in  
3 2017. He's again working less hours barely two years  
4 later in 2019.

5 So in our opinion, this wouldn't plausibly  
6 plead claims of either retaliation or discrimination  
7 (indiscernible) to a 12(b)(6) motion.

8 And also, the allegations are implausible on --

9 THE COURT: But Rule 15D says that -- are you  
10 saying that the original pleading is defective or the  
11 supplemental pleading?

12 MR. WILLIAMSON: Our opinion is that both are.

13 THE COURT: Yet you didn't move to dismiss?

14 MR. WILLIAMSON: Yes, that was a strategic  
15 decision. And I will remark that at the original earlier  
16 conference with the prior magistrate judge, the  
17 magistrate judge even remarked and asked plaintiff at  
18 that conference whether or not just pleading  
19 (indiscernible) was enough. We did make a strategic  
20 decision back then not to file a motion to dismiss.  
21 Instead, that would have been dealt with on the motion  
22 for summary judgment after the discovery period ended and  
23 plaintiff had not yielded any -- or the discovery period  
24 hadn't yielded any evidence to support the implausible  
25 allegations.

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1           And just to add to my earlier point, your  
2 Honor, the proposed supplemental pleading is implausible  
3 on its face. He alleges that he worked 178 fewer hours  
4 in 2020 than he did in 2019. Well during the COVID  
5 pandemic, New York City Executive Order essentially shut  
6 down the entire construction industry for approximately  
7 three months which is a much more plausible explanation  
8 for the de minimis reduction in hours than any  
9 retaliation based on protected activity that occurred in  
10 mid-2017 and resulted in the EEOC charge.

11           THE COURT: But isn't the question whether in  
12 2020 he worked a few hours than white workers, white  
13 union members, not whether he worked less hours than he  
14 had previously worked? I mean that's the --

15           MR. WILLIAMSON: The way the proposed pleading  
16 is framed, your Honor, is that his reduction in hours was  
17 a result of retaliation by the union. And he tries to  
18 try it to the EEOC complaint and made-2017 which I would  
19 mention the proposed supplemental pleading doesn't  
20 reference the amount of hours that the plaintiff worked  
21 in 2018 but instead jumps all the way ahead to 2019. But  
22 I'd even argue that he hasn't plausibly -- or he would  
23 not be able to plausibly plead a causal connection  
24 between the EEOC charge in 2017 and a de minimis  
25 reduction in hours in 2019, a year and a half later.

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1           And in addition to the futility here of this  
2 application, your Honor, plaintiff could have and should  
3 have made or raised these allegation months, if not years  
4 ago. He's referencing the amount of hours he worked  
5 dating back to 2019. Plaintiff has known how many hours  
6 he worked since 2019 and plaintiff's counsel has known  
7 the latest and 2021 the number of hours that he worked in  
8 2019. Despite that, he's waited until nearly a month  
9 after fact discovery closed, which was extended a number  
10 of times. And on the final extension, your Honor, it  
11 explicitly provided in the order granting the extension  
12 that no further extensions would be granted.

13           Despite all of that, Mr. O'Neill waited until  
14 after fact discovery closed to make this application.  
15 And I don't think there's a coincidence here that  
16 plaintiff has filed this application just a handful of  
17 days after his transcript was reviewed and errata sheet  
18 was submitted that included material changes to his  
19 testimony which precipitated our request to conduct a  
20 further deposition of the plaintiff. And as far as  
21 plaintiff --

22           THE COURT: (Indiscernible).

23           MR. WILLIAMSON: Sorry, your Honor.

24           THE COURT: Go ahead, Mr. Williamson, finish  
25 up.

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1 MR. WILLIAMSON: I was going to say as far as  
2 Mr. O'Neill's argument that this was precipitated by our  
3 refusal to produce data beyond 2019, well he's had that  
4 data since February of 2022. Despite that, he waited  
5 until just a handful of days before the close of fact  
6 discovery, 13 months later, to ask for further data. So  
7 I don't think there could be a clearer example of undue  
8 delay here.

9 THE COURT: Is it the defendant's position that  
10 plaintiff can't assert any claims for anything that  
11 happened after he filed the complaint?

12 MR. WILLIAMSON: Our position would be that his  
13 recovery would be cut off in this action up until the  
14 complaint based on the way the complaint is framed now.

15 THE COURT: Why did he produce data after the  
16 date of the complaint? Data of the hours worked and  
17 all --

18 MR. WILLIAMSON: Yeah, my under --

19 THE COURT: -- that after the date of the  
20 complaint?

21 MR. WILLIAMSON: My understanding, your Honor,  
22 is that's just the way the data is produced  
23 electronically, it's by year. And I believe that was  
24 also a part of some discussion between the attorneys in  
25 this case and also the union's in-house counsel when

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1 there was extensive motion practice on the issue of  
2 electronic data.

3 THE COURT: What would prohibit Mr. O'Neill  
4 from filing a separate action on this claim?

5 MR. WILLIAMSON: We're not saying he couldn't,  
6 your Honor. He could. But again, we would make the same  
7 motion to dismiss there based on those allegations.  
8 We're not saying here that he shouldn't be able to file a  
9 motion or fully brief a motion in this proposed  
10 supplemental complaint. It's just that our position  
11 would be the same here as it would be in the new action  
12 that those allegations, related claims would be futile  
13 because they'd be subject to 12(b)(6) motions.

14 THE COURT: And yet your client made a  
15 strategic decision not to file such a motion in this  
16 case.

17 MR. WILLIAMSON: That's correct, at the start  
18 of discovery, or prior to discovery.

19 THE COURT: All right. Mr. O'Neill, why don't  
20 you just file a separate case and then have it related to  
21 this one? You know, get --

22 MR. O'NEILL: Well yeah, I mean yeah, I suspect  
23 if I did file a separate case in the eastern district  
24 then the defendant would probably move to consolidate.  
25 I'm just confused by defendant's position here a little



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1 bit. I've never known a defendant who prefers two  
2 lawsuits over one. It certainly would make settling a  
3 case more difficult because they would want a general  
4 release and we'd have a separate case out there.

5 But if that's what defendants want, then I  
6 guess that's what they can have.

7 MR. WILLIAMSON: Just to clarify again, our  
8 desire isn't to litigate two cases. We think plaintiff  
9 should be able to file his motion in this case and we'll  
10 just oppose it, make the same argument that we would and  
11 it would be decided here.

12 THE COURT: But that wouldn't preclude him,  
13 even if you would win that motion, that wouldn't preclude  
14 him from the next day filing another case.

15 MR. WILLIAMSON: That's correct.

16 THE COURT: This is only whether he can -- this  
17 motion is only whether he can file a supplemental  
18 complaint. It wouldn't be with prejudice to the claim.  
19 So --

20 MR. WILLIAMSON: The other thing I would note  
21 with the issue with him filing a new action, a new claim,  
22 that he's going to try to assert presumably Title 7 and  
23 other claims that are going to be time barred. And one  
24 other thing here is that the underlying EEOC charge here,  
25 Mr. O'Neill, or plaintiff rather, did not raise a

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1 retaliation claim. And so that's something else that  
2 would be dealt with on a motion for summary judgment  
3 here. And his failure to exhaust is something that's  
4 included in our answer here. The failure to exhaust is  
5 (indiscernible).

6 THE COURT: Why don't you, Mr. O'Neill, why  
7 don't you file a full blown motion and I'll have you  
8 folks confer on a briefing schedule for it. Or if you  
9 think it's more expeditious, Mr. O'Neill, go ahead and  
10 file another action and seek to have it consolidated with  
11 this one. That will at least save you the headache of  
12 filing a motion.

13 MR. O'NEILL: Yeah. Okay. That's fine. One  
14 or the other or I suppose neither. But we'll -- well, I  
15 don't want to be too coy here. I mean well I don't know  
16 whether there would be -- I mean there would probably be  
17 some federal jurisdiction on a standalone complaint based  
18 on events occurring after we filed the first complaint.  
19 But it's also possible that plaintiff would want to bring  
20 that in state court. So if we bring a separate action,  
21 it may not be in the federal court.

22 THE COURT: Or maybe they'll remove it somehow.

23 MR. O'NEILL: Well, if it has federal claims,  
24 they could do that.

25 THE COURT: All right. Look --

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1 MR. O'NEILL: But anyway, that's something for  
2 the plaintiff to decide and we'll talk it over with him.

3 THE COURT: Why don't you think about it? He  
4 And if you are going to file a motion to supplement with  
5 a brief and all of that, I would like to know what the  
6 briefing schedule is going to be. No later than -- I'll  
7 give you till June 3rd.

8 MR. O'NEILL: Okay.

9 THE COURT: You'll make a decision over the  
10 next week, meet and confer with Mr. Williamson and tell  
11 me what the briefing schedule is going to be. I'm  
12 uncomfortable making a decision on these letters.

13 MR. O'NEILL: Sure.

14 THE COURT: All right?

15 MR. O'NEILL: A couple of housekeeping items,  
16 your Honor, if I may?

17 THE COURT: Sure.

18 MR. O'NEILL: As Mr. Williamson mentioned,  
19 we've agreed to produce plaintiff to answer any questions  
20 they have about the corrections he made in the  
21 transcript. So I have no objection to that. I just want  
22 the Court to be aware that we will be doing that.

23 Defendant has not produced a 30(b)(6) witness  
24 for one of the categories which was to explain some of  
25 the finer points of its computer system and database, and

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1 they have not agreed to produce a witness. So I don't  
2 know if we can deal with that today or if you want  
3 separate letters on that.

4 And then I take it we'll be holding the expert  
5 disclosure discovery in abeyance until the supplemental  
6 complaint issue is resolved?

7 THE COURT: Yes. What about the 30(b)(6)  
8 witness, I guess additional 30(b)(6) witness, Mr.  
9 Williamson?

10 MR. WILLIAMSON: So as part of planning the  
11 30(b)(6) notice there were a number of topics listed  
12 obviously and one of them dealt with really the specifics  
13 are more of a technological aspect of the union's  
14 Referral Hall data or Referral Hall processes. We told  
15 Mr. O'Neill that the union doesn't have anyone in house  
16 who maintains or otherwise has knowledge of the technical  
17 side of it. We've identified the outside vendor who  
18 handles that. We've even offered to facilitate service  
19 of a subpoena on that entity to help Mr. O'Neill conduct  
20 a deposition of that entity and we stand ready to do that  
21 moving forward also.

22 THE COURT: Mr. O'Neill, why is that not a  
23 problem? Why is that a problem?

24 MR. O'NEILL: Well, is not necessarily a  
25 problem. If defendant is agreeable to us doing it that

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1 way, I'll do it that way.

2 MR. WILLIAMSON: Yeah, that's what we --

3 MR. O'NEILL: I mean it's their database. And  
4 I am certain that if they wanted this information, they  
5 could get it if they haven't already got it. And I don't  
6 think it should be our requirement to chase down somebody  
7 for information that they have control over, but I'm  
8 willing to do it that way if that's --

9 THE COURT: Well I mean the alternative is that  
10 they get someone to confer with whoever from that company  
11 to get up to speed on it. But I'm sure if they did that,  
12 there would be questions that you would ask that that  
13 additional 30(b)(6) witness won't be able to answer  
14 because they're not the master of the computer program.  
15 They just don't know. They get an outside vendor to  
16 prepare a computer system for them and they say here's  
17 how you put in the data and a 30(b)(6) witness is not  
18 going to know enough even if they --

19 MR. O'NEILL: Yeah, I understand. I just think  
20 that they control this witness, that they could -- they  
21 haven't said that the person that they use won't testify,  
22 they've asked him to and he's refused. They just tell me  
23 I got to go get him. But you know, I'll do it their way.  
24 I --

25 MR. WILLIAMSON: That's not what we told

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1 plaintiff's counsel. We've offered from the outset after  
2 we identified this is the outside entity that does it.  
3 If Mr. O'Neill -- it shouldn't take long to prepare a  
4 subpoena. We will facilitate service and have them  
5 appear. We can't make a third party appear at a  
6 deposition.

7 THE COURT: No, but you can ask.

8 MR. O'NEILL: I'll do it that way, your Honor.

9 THE COURT: Mr. O'Neill, prepare the subpoena  
10 and work with Mr. Williamson to have it served. And if  
11 you have a problem getting that person, then you'll let  
12 me know and we'll deal with that.

13 MR. O'NEILL: Okay. Fair enough. All right.  
14 Well that's all plaintiff has for today.

15 THE COURT: Okay. All right. Thank you,  
16 gentlemen.

17 MR. WILLIAMSON: Thank you, your Honor.

18 MR. O'NEILL: Thank you, your Honor.

19 (Matter concluded)

20 -oOo-

C E R T I F I C A T E

I, MARY GRECO, hereby certify that the foregoing transcript of the said proceedings is a true and accurate transcript from the electronic sound-recording of the proceedings reduced to typewriting in the above-entitled matter.

I FURTHER CERTIFY that I am not a relative or employee or attorney or counsel of any of the parties, nor a relative or employee of such attorney or counsel, or financially interested directly or indirectly in this action.

IN WITNESS WHEREOF, I hereunto set my hand this 2nd day of August, 2022.

  
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